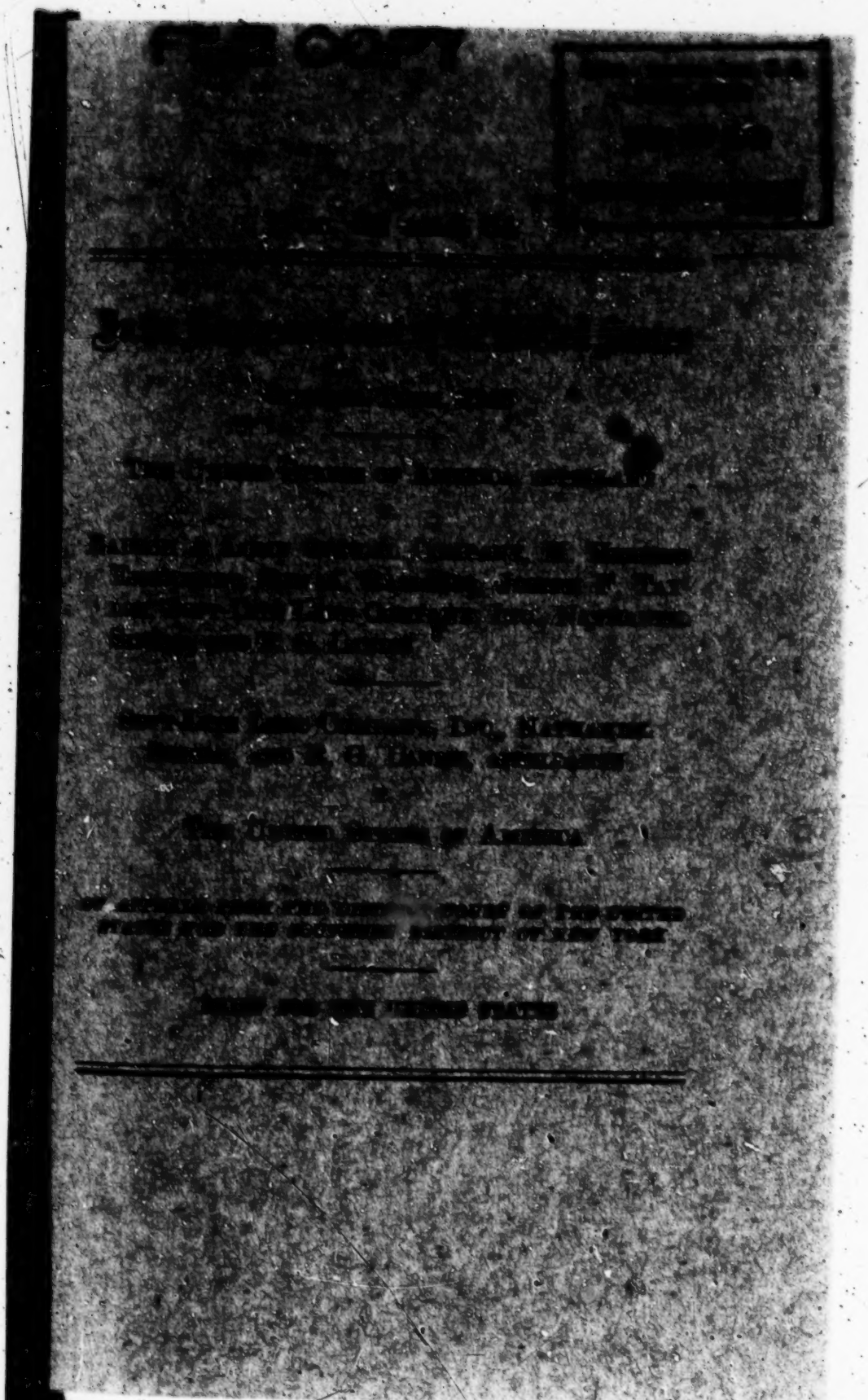

INDEX

CITATIONS

Cases:

Statutes:

Miscellaneous:

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 62

THE UNITED STATES OF AMERICA, APPELLANT

v.

BAUSCH & LOMB OPTICAL COMPANY, M. HERBERT EISENHART, BEN A. RAMAKER, JOSEPH F. TAYLOR, SOFT-LITE LENS COMPANY, INC., NATHANIEL SINGER, AND R. G. LANDIS

No. 64

SOFT-LITE LENS COMPANY, INC., NATHANIEL SINGER, AND R. G. LANDIS, APPELLANTS

v.

THE UNITED STATES OF AMERICA

ON APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the district court (R. 19) is reported in 45 F. Supp. 387.

JURISDICTION

The judgment of the district court was entered on February 1, 1943 (R. 60). Petition for appeal in No. 62 and petition for appeal in No. 64 were both filed on April 1, 1943, and were both allowed on the same day (R. 65, 71, 79).

The jurisdiction of this Court is conferred by Section 2 of the Act of February 11, 1903, 32 Stat. 823, 15 U. S. C. sec. 29, and by Section 238 of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 936, 938, 28 U. S. C. sec. 345. Probable jurisdiction was noted on June 1, 1943 (R. 1016).

QUESTIONS PRESENTED

(1) Whether the combination and conspiracy to which the Soft-Lite Lens Company, Inc., and its appellee officers are parties, to fix and maintain resale prices on Soft-Lite lenses, to boycott retailers who fail to abide by the policies prescribed by Soft-Lite, and otherwise to control the interstate distribution of Soft-Lite lenses, constitutes a combination and conspiracy in restraint of interstate commerce forbidden by Section 1 of the Sherman Act, as the district court held.

(2) Whether any exemption conferred by the Miller-Tydings Act limited the power of the district court to cancel Soft-Lite's "fair trade" resale price-maintenance contracts.

(3) Whether the agreement by Bausch & Lomb Optical Company not to sell pink-tinted glass or-

lenses to any competitor of Soft-Lite and not to compete with Soft-Lite in the marketing of any pink-tinted lens unreasonably restrains interstate commerce, in violation of Section 1 of the Sherman Act.

(4) Whether the judgment entered by the district court grants adequate relief against the danger of continuance or revival of Soft-Lite's combination with wholesalers to maintain uniform resale prices on Soft-Lite lenses and to boycott retailers whom Soft-Lite regards as "unethical."

(5) Whether the judgment below, in conferring upon the Government a limited authority to inspect the Soft-Lite books and records, invades rights of the defendants guaranteed by the Fourth and Fifth Amendments.

STATUTE INVOLVED

The Act of July 2, 1890, 26 Stat. 209, known as the Sherman Act, provides in part as follows:

> SECTION 1 [as amended by the Act of August 17, 1937, 50 Stat. 693]. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: *Provided,* That nothing herein contained shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade mark, brand, or name of the producer or dis-

tributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 5, as amended and supplemented, of the Act entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," approved September 26, 1914: *Provided further,* That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. * * * (15 U. S. C. sec. 1.)

* * * * *

SEC. 4 [as amended by the Act of March 3, 1911, Sec. 291, 36 Stat. 1167]. The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act * * *. (15 U. S. C. sec. 4.)

STATEMENT

Proceedings below

This is an equity proceeding brought by the United States under Sections 1 and 4 of the Sherman Act against the Bausch & Lomb Optical Company, the Soft-Lite Lens Company, Inc., and certain officers of each of these corporations.[1] The complaint alleges that the defendants combined and conspired to restrain interstate commerce in unpatented pink-tinted lenses sold under the trade-mark "Soft-Lite" by establishing and maintaining a controlled system of distribution for these lenses.[2]

---

[1] For convenience, Bausch & Lomb Optical Company will be referred to as Bausch & Lomb; and Soft-Lite Lens Company, Inc., and its corporate predecessor company, Optical Service Company, will be referred to as Soft-Lite.

The defendants below, other than the two corporate defendants, were Nathaniel Singer, R. G. Landis, and Morris Singer, respectively, president, vice president, and chairman of the board of directors of Soft-Lite, and M. H. Eisenhart, Ben A. Ramaker, and Joseph F. Taylor, respectively, president, sales manager, and treasurer of Bausch & Lomb (R. 4–5). All of the defendants below except Morris Singer are appellees in No. 62; and Soft-Lite, Nathaniel Singer, and R. G. Landis are appellants in No. 64.

The district court concluded that there was no evidence showing that Morris Singer had participated in the conspiracy and dismissed the complaint as against him (R. 59). The Government did not assign error to this dismissal.

[2] As used in the complaint (R. 5) and as used herein, the word "lens" means a lens manufactured of glass to give the user normal vision, as in all types of spectacles and eyeglasses. A "tinted lens" means one manufactured of colored glass. This type of lens is represented as giving relief against eyestrain caused by glare (Ex. 39, R. 685–6).

The chief features of this distribution system, as alleged in the complaint, were that (a) only selected wholesalers willing to cooperate in the system were permitted to purchase or deal in Soft-Lite lenses, (b) these wholesalers resold to retailers at uniform prices fixed by Soft-Lite and (c) the wholesalers resold only to retailers who had been "licensed" by Soft-Lite and who had agreed to sell to consumers at the prices "prevailing" in the retailer's locality and to observe the sales policies established by Soft-Lite. The complaint also alleged that, as a part of the conspiracy and for the purpose of protecting Soft-Lite against competition, Bausch & Lomb, which manufactured and sold to Soft-Lite the pink-tinted lenses which Soft-Lite resold to wholesalers, had agreed not to make or sell any pink-tinted lenses other than those which it sold to Soft-Lite. (R. 7–9.)

The Government's evidence consisted primarily of documents from the files of the corporate defendants and testimony of certain of their officers, and the defendants' evidence is confined to certain documents introduced in the "cross-examination" of their own officers. The evidentiary facts are not in substantial dispute.

The district court held that the Soft-Lite distribution system constituted an illegal combination to boycott all retailers not licensed by Soft-Lite, to charge uniform prices on all sales by whole-

salers to retailers, and to enforce arbitrary, non-competitive prices on sales by retailers to consumers, but that Bausch & Lomb and its officers had not been shown to be parties to this conspiracy (R. 26–33). The court also held that Bausch & Lomb's agreement to manufacture pink-tinted lenses exclusively for Soft-Lite was not, in itself, an unreasonable restraint of interstate commerce and that, to the extent that this exclusive contract was an element in and contributed to Soft-Lite's illegal distribution system, "the balance of advantage lies in permitting the manufacturing arrangement, properly insulated against the unlawful distribution system, to survive" (R. 33–36).

The court made findings of fact and conclusions of law giving effect to the foregoing views (R. 52–59). It entered judgment granting certain injunctive relief against the Soft-Lite defendants and dismissed the complaint as against the Bausch & Lomb defendants (R. 60–65).

Both the Government and the Soft-Lite defendants have appealed from the judgment below. The Government's appeal (No. 62) specifies as error the failure of the district court to strike down Bausch & Lomb's agreement not to make or sell any pink-tinted lenses other than those sold to Soft-Lite, and its failure to grant sufficiently broad injunctive relief to prevent a continuation or revival of Soft-Lite's illegal distribution system.

560996—43——2

The appeal by the Soft-Lite defendants (No. 64) specifies as error the court's holding and judgment that these defendants had conspired with Soft-Lite wholesalers illegally to restrain interstate commerce. Their appeal also attacks the provisions of the judgment (a) relating to the "fair trade" resale price maintenance contracts between Soft-Lite and its wholesalers, (b) restraining Soft-Lite for six months from systematically suggesting wholesaler or consumer prices, and (c) giving the Government certain rights of access to the Soft-Lite books and records.

Soft-Lite's exclusive contract with Bausch & Lomb

Morris Singer, who operated several retail optical stores in New York City, began selling pink-tinted lenses under the trade-mark "Soft-Lite" as early as 1908 (R. 451; Ex. I,[3] R. 963, 965). In 1922 he and his son, Nathaniel Singer, organized a corporation (Soft-Lite's predecessor) to market this lens to wholesalers (R. 451–2). The corporation imported the glass from which the lenses were made and the grinding was done in this country by several concerns (R. 86–7). Soft-Lite sales in 1922, 1923, and 1924 were comparatively small (R. 87).

---

[3] The exhibits introduced by the Government are numbered and the exhibits introduced by the defendants bear letters of the alphabet.

In June 1924 Soft-Lite made an agreement with Bausch & Lomb, which manufactures a complete line of optical goods distributed solely through wholesalers (Ex. 206, R. 951–2, 954), for it to manufacture lenses from the imported glass furnished by Soft-Lite (R. 94; Exs. 1, 1–A, R. 631–5). Bausch & Lomb agreed that any orders which it received from the trade would be transmitted to Soft-Lite, and Soft-Lite furnished to Bausch & Lomb lists of the Soft-Lite "jobbers and retail licensees" (Ex. 1, R. 632).

About two months later the parties made an agreement that Bausch & Lomb would manufacture the glass for Soft-Lite lenses as well as grind the lenses (R. 469–70; Exs. 2, 2–A, R. 638–9). It was likewise agreed that Bausch & Lomb would make pink-tinted lenses only for Soft-Lite (*ibid.*). As the parties further defined this agreement in an exchange of letters in 1926, Bausch & Lomb "understood that we would safeguard your [Soft-Lite] interests in every way" and not to "make competition" for Soft-Lite "by either marketing a tinted lens of our own or producing similar tinted glass for other manufacturers" (Exs. 3, 4, R. 639–40). This agreement still remains in effect and governs the parties' present relations (R. 105).

The various steps taken to implement this agreement, and its relationship to the Soft-Lite distribution system, are set forth later (*infra*, pp. 17–22).

The Soft-Lite distribution system

The Soft-Lite lenses manufactured by Bausch & Lomb are bought by Soft-Lite at definite prices.[4] Soft-Lite resells these lenses to wholesalers, the latter resell to retailers, and the retailers in turn sell to general consumers. Soft-Lite thus plays no functional part in distribution. Its sole role is (a) sales promotion and (b) maintaining control over the distribution of its product, and particularly over prices following the initial outright sale from Soft-Lite to wholesaler.

(a) The wholesalers' part in the system

Soft-Lite has always sold its lenses only to a limited number of wholesalers selected by it.[5] Although it makes no written contract[6] with its wholesalers, it has referred to them as "licensed"

---

[4] The price was originally fixed at 10% less than the price to wholesalers of the principal tinted lens then on the market (R. 468; Ex. 2–A, R. 638). The formula later used was a mark-up of a definite number of cents over Bausch & Lomb's sale price to wholesalers for a corresponding "white" (i. e., uncolored) lens (*infra*, p. 19).

[5] Fng. 13, R. 54; R. 161–3, 480.

Soft-Lite publishes lists of its wholesalers in advertisements and these lists are also printed in trade journals from time to time (R. 578). At the time of trial Soft-Lite had about 97 wholesalers (R. 129).

[6] The recent "fair trade" contracts between Soft-Lite and most of its wholesalers (*infra*, pp. 12–13), embrace only a part of the obligations assumed by becoming a Soft-Lite wholesaler, were not offered by the Government as evidence of unlawful conspiracy, and are relevant, if at all, only in connection with the scope of relief to which the Government is entitled.

or "licensees" in published price lists (R. 165), in its printed form of license contract with retailers (Ex. 43, R. 690), as well as in correspondence with wholesalers (Exs. 17 (R. 654–5), 23 (R. 657), 172, 173 (R. 916–7)).

Soft-Lite distributes to its wholesalers a printed list of the prices at which the Soft-Lite lenses are to be sold by the wholesaler to the retailer, and the wholesaler is "very plainly" informed that these prices will have to be followed if the wholesaler desires to continue to handle Soft-Lite lenses.[7] Soft-Lite likewise furnishes these price lists to all retailers authorized to handle its product and they are given to understand that they can buy the lenses only at the prices designated (R. 220–2). In dealings between wholesaler and retailer, therefore, both buyer and seller are instructed as to the exact prices at which all transactions are to be consummated. Counsel for Soft-Lite conceded that it expected its wholesalers to follow the prices designated by Soft-Lite and that, as far as Soft-Lite knew, the wholesalers did follow these prices (R. 280). The president of Soft-Lite testified that the system of maintaining fixed wholesaler-to-retailer prices was "very effective" (R. 455–6).

Soft-Lite instructs its wholesalers to sell only to retailers licensed by Soft-Lite except that its wholesalers are authorized to sell to retailers whom

[7] R. 220, 222–3, 310, 315, 455–6.

Bausch & Lomb has licensed to sell certain patented lenses manufactured and sold by Bausch & Lomb.[8] Soft-Lite supplies its wholesalers with a list of its licensed retailers and sends the wholesalers periodic notices of all changes made in this list.[9] Wholesalers were notified in writing when a retailer's license was cancelled, and the Soft-Lite wholesalers ordinarily "observed this exclusion" (Fng. 23, R. 56).

Soft-Lite consulted its wholesalers before making changes in its price list (including wholesaler-to-retailer prices) and before adopting changes in its retail distribution policies.[10] Its wholesalers actively cooperated in enforcing and policing these policies, and particularly the policy that the retailer sell to consumers at the prices "prevailing" in his locality.[11] Soft-Lite, in making changes in its lists of licensed retailers, very largely relied on the judgment of its wholesalers.[12]

Contracts which Soft-Lite has made with most of its wholesalers since 1940 provide that in any

---

[8] Fng. 13, R. 54; R. 154, 222, 310, 363, 482; Exs. 37 (R. 681), 97 (R. 803).

[9] R. 188; Exs. 60-60-E (R. 719-82).

[10] R. 482, 485-6, 555; Exs. 46 (R. 705), 129-132 (R. 843-6), 136-138 (R. 848-51). The wholesalers primarily consulted (*ibid.*) were those affiliated with Bausch & Lomb, through whom Soft-Lite marketed most of its lenses (see p. 20, *infra*).

[11] R. 327-9, 336, 350, 361-2, 501-2; Exs. 61-62 (R. 782-3), 194-198 (R. 929-31).

[12] R. 217, 489; Exs. 61-62 (R. 782-3), 68-73 (R. 787-91), 75-76 (R. 793), 82-84 (R. 797-8), 89-90 (R. 801), 182-183 (R. 923-4).

State having a Fair Trade Practice Act the wholesaler shall not sell Soft-Lite lenses below the minimum resale prices established by Soft-Lite (Fng. 35, R. 58; R. 629; Exs. R, S, S–1, R. 989–97).

(b) The retailers' part in the system

Prior to 1927 the Soft-Lite retailers were selected by its wholesalers, who were instructed to sell only to the "right type" of retailer (R. 480).[13] In that year Soft-Lite required its wholesalers to procure from "stock"[14] retailers a "Signed Application For A Soft-Lite Licensee Privilege"; the form, as slightly changed in 1928, called for endorsement by a Soft-Lite wholesaler and acceptance by Soft-Lite.[15]

In 1933 Soft-Lite informed the trade that only retailers licensed by it would be permitted to deal in Soft-Lite lenses and Soft-Lite requested its wholesalers to obtain from every retailer to whom they sold a signed license "Agreement".[16] By the terms of this agreement Soft-Lite granted the

---

[13] When a wholesaler accepted an order from a retailer for shipment of a stock of Soft-Lite lenses the wholesaler notified Soft-Lite and it then notified all of its other wholesalers in the retailer's territory (R. 481).

[14] A "stock" retailer, as distinguished from a "prescription" retailer, is one who orders a prescribed minimum stock of lenses and who has cutting and edging equipment for doing work on blank lenses which, in the case of a prescription licensee, is done by the wholesaler (Fng. 14, R. 54–5; R. 222; Ex. 169 (R. 900–1)).

[15] R. 125–6, 481; Exs. 11, 12, R. 652–652a.

[16] R. 482, 486; Exs. 48–52, R. 705–14.

retailer a nontransferable "license", terminable on 30 days', notice, to purchase its lenses from any "licensed" Soft-Lite wholesaler and to resell such lenses at prices "prevailing" in the licensee's locality (Ex. 43; R. 700). The licensee, on his part, agreed not to sell any lens "similar in tint, color, or shade" to those of Soft-Lite and to sell only to consumers (*ibid.*).[17]

A new form of license adopted in 1939 and used ever since contains substantially the same provisions.[18] The retailer must sign an application in which he "agrees" to observe strictly the terms of the license, and the wholesaler signing the application and recommending the retailer must state whether the latter maintains "prevailing local price schedules" and whether he indulges in installment advertising in which "prices are quoted in any form" (R. 169–70; Ex. 44, R. 703).

Soft-Lite's 1931 stock price list gives as a reason for the general use of Soft-Lite lenses that the retailer's income from them is "more substantial and protected" (R. 439). It was part of Soft-Lite's consistent "advertising slogan and halo" that the retailer's profit on Soft-Lite lenses was greater and that he did not have to sell them in competition with persons selling at cut-rate prices (R. 440).

---

[17] The purpose of the latter provision, as stated in Soft-Lite's notification to the trade, was "to prevent the sale or exchange of Soft-Lite lenses between Licensees and non-licensees" (Ex. 47, R. 707).

[18] R. 171, 180–1, 430; Exs. 45 (R. 704–5), 57 (R. 718–9).

While Soft-Lite has not prescribed specific prices for sales from retailer to consumer,[19] it has actively enforced the requirement that the retailer maintain the prices "prevailing" in his locality, and it cancels the retailer's license if he fails to observe this requirement.[20] The district court found that Soft-Lite and its wholesalers exerted regulatory forces on these prices by enforcing the retailer's undertaking to sell at "prevailing" prices and by requiring retailers to sell Soft-Lite lenses at a premium over comparable untinted lenses (Fng. 26, R. 57).

Since 1932 or 1933 Soft-Lite has followed the practice of furnishing its retailers with "Protection Certificates" (R. 523; Ex. 13, R. 652–3). When Soft-Lite ships lenses to a wholesaler it sends him a corresponding number of protection certificates, and the wholesaler is instructed to include one of the certificates with each pair of lenses shipped to a retailer (R. 126–7). The certificates are numbered in such a way as to

---

[19] During the time that Soft-Lite sold "goggles" made of Soft-Lite glass, goggles being glasses which filter out some light but otherwise do not affect vision (R. 223, 225), it published fixed prices for retailer-to-consumer sales (Fng. 26, R. 57; R. 126–7, 225, 516; Exs. 98, 99, R. 804–5).

There is also some evidence that lists showing Soft-Lite prices from retailer to consumer were given to certain retailers by Soft-Lite or by its wholesalers (R. 306–7, 504; Ex. 106, R. 814).

[20] Fng. 22, R. 56; R. 248–9, 487–8; Exs. 61–64 (R. 782–5), 70 (R. 788), 73 (R. 791), 74–74–J (R. 791a–791k), M (R. 975–80).

identify the wholesaler. The trade is informed that the certificate indicates "the wholesale source of supply." (R. 523; Ex. 37, R. 682.)

Out of about 14,000 active optometric retailers in the United States, from 7,000 to 8,000 are Soft-Lite licensees (Fng. 20, R. 56; R. 372).

The district court's opinion points out that Soft-Lite constituted "an additional link in the chain of distribution inserted between the manufacturer and the wholesaler" and that the only way of meeting the cost of this additional link was by a "higher price" to the consumer (R. 28). "A premium price to the consumer above untinted lenses was, therefore," the court said, "the sine qua non of Soft-Lite's existence" (*ibid.*). The court, after referring to testimony by Soft-Lite's president that its high prices were achieved by superior salesmanship, advertising, and the building of a "halo" about Soft-Lite lenses, said (R. 29):

> Undoubtedly these contributed. I find, however, that the "halo" was no more than the glitter of high price, artificially maintained by a framework of agreements in restraint of trade.
>
> These were designed to confer upon Soft-Lite the power to control the price of its lenses at every stage of distribution down to consumer. They were effective instruments for the accomplishment of that

purpose and were successfully used to attain it.[21]

An interoffice memorandum by the officer of Bausch & Lomb in charge of its lens sales division summed up Soft-Lite's role as follows (Ex. 202, R. 935):

> The economic justification for the existence of Soft-Lite in the picture has always been that they *start with high retail prices and from this develop a price schedule that leaves an attractive profit at every link in the chain of distribution,* including the very sizeable mark-up in price between our sales price to Soft-Lite at the factory and our purchase price paid to Soft-Lite at distribution.[22] [Italics supplied.]

Bausch & Lomb's relations with Soft-Lite

From the time when Bausch & Lomb first agreed not to make or sell any pink-tinted lenses other than those sold to Soft-Lite (*supra,* p. 9), the contacts between the two companies have been

[21] The district court also mentioned, as a "conspicuous" feature of the "mischief" of Soft-Lite's agreements, that the retail purveyor of the lenses is frequently the one who also "prescribes" for the patient-customer, and that the knowledge that he can prescribe a lens whereon his profit is greater is thus introduced into his quasi-professional judgment (R. 29).

[22] The words "our purchase price paid to Soft-Lite at distribution" refer to the purchases from Soft-Lite made by wholesalers affiliated with and subsidiaries of Bausch & Lomb (see *infra,* p. 20).

varied and close, and have embraced the entire gamut of Soft-Lite's distribution policies and system.

Under the original manufacturing agreement, Soft-Lite purchased from Bausch & Lomb, at a reduced price, any substandard lenses, or seconds, produced in the course of manufacturing Soft-Lite lenses (Ex. 2–A, R. 639). The parties later agreed that Bausch & Lomb would take title to these second-quality lenses, would sell them only in foreign countries and at prices mutually agreed upon, and would pay Soft-Lite a percentage of the recovery price (Fng. 9, R. 53, R. 107; Ex. 8, R. 643–4). Bausch & Lomb thus cooperated with Soft-Lite in keeping these second-quality lenses off the domestic market.

Bausch & Lomb held a patent on a bifocal lens called Nokrome and gave Soft-Lite the exclusive distribution of lenses manufactured under this patent when made in Soft-Lite glass (R. 104; Ex. 5, R. 641). When Bausch & Lomb licensed two other concerns to manufacture and sell under this patent it provided that the licensee's sales price on tinted lenses should be not less than Soft-Lite's price to wholesalers (R. 608–9; Exs. 163, 164, R. 871–7). The purpose of this provision was to protect Soft-Lite's market (R. 609).

Bausch & Lomb and Soft-Lite have frequently discussed Soft-Lite prices, including those on sales from Soft-Lite to wholesalers, from wholesalers to retailers, and from retailers to con-

sumers (Fng. 29, R. 57; R. 381–2, 387, 598–9). When Soft-Lite contemplated a change in prices for certain lenses to put them in a better "competitive" position, Bausch & Lomb immediately revised its prices to Soft-Lite, "As a means of assisting them to meet this situation" (Ex. 120, R. 827). On several occasions Bausch & Lomb gave Soft-Lite advice on the pricing of Soft-Lite lenses, and Soft-Lite followed this advice.[23] Soft-Lite, in a letter enclosing a new price list to those of its wholesalers classified as distributors, stated that Bausch & Lomb "have cooperated substantially in the expectation that these price adjustments will materially increase your total sales" (Ex. 102, R. 809).

Bausch & Lomb insisted, on each occasion on which it reduced its price to Soft-Lite,[24] that Soft-Lite pass on the price reduction to wholesalers and retailers (R. 599, 603–4, 612–6). The reason for this insistence was Bausch & Lomb's belief that lower prices to the trade would increase the sale of Soft-Lite lenses and therefore Bausch & Lomb's sales to Soft-Lite (R. 625).

---

[23] Exs. 103, 104 (R. 809–13), 116–120 (R. 824–7), 128 (R. 839–40).

[24] The formula used, at least since 1933, in determining Bausch & Lomb's price to Soft-Lite has been a fixed mark-up (6⅔¢ for single-vision lenses and 13⅓¢ for bifocals) over Bausch & Lomb's price for the corresponding "white" lens, and application of this formula called for a reduction in Bausch & Lomb's price to Soft-Lite whenever Bausch & Lomb reduced its prices on white lenses (R. 624–5).

Bausch & Lomb and Soft-Lite agreed to charge identical prices for lens cleaning cloths and lens cabinets, which they sold to the trade at approximately cost, primarily for advertising purposes (Fng. 30, R. 57; R. 404–6; Exs. 144–146, R. 856–9).

On certain occasions Bausch & Lomb made recommendations as to the addition or removal of wholesalers to or from Soft-Lite's list and, in at least one instance, Soft-Lite deferred the reinstatement of a retailer's license pending receipt of Bausch & Lomb's views on such action (Exs. 170–171 (R. 914–5), 190–193 (R. 927–9)).

The alliance in interest growing out of the exclusive agreement between Bausch & Lomb and Soft-Lite has been extended to the field of distribution not only in the foregoing ways but also through the medium of the wholesale firms affiliated with Bausch & Lomb. The latter distributes its products chiefly through six optical wholesale companies in which it owns a controlling stock interest (Ex. 206, R. 954). These wholesale affiliates, which operate a total of 164 branches, deal principally in Bausch & Lomb products but they also deal in the goods of other manufacturers and they purchase about two-thirds of all lenses sold by Soft-Lite.[25] Under these circumstances

[25] R. 150; Ex. 33, R. 665; Ex. 206, R. 952–4.
Since Soft-Lite sells to about 97 wholesalers (R. 129), this means that the other 33% of its sales is distributed among some 91 wholesalers.

it is not surprising that practically all of the evidence relating to participation by wholesalers in the Soft-Lite distribution system involved one or more of the Bausch & Lomb wholesale affiliates.

As to two-thirds of Soft-Lite's business, therefore, Bausch & Lomb is, in substance, both manufacturer and distributor; it manufactures the product and, after an intermediate sale to Soft-Lite, distributes the product through its wholesale affiliates. Since Soft-Lite realizes a gross profit on its sales of more than 100%,[26] it would seem to be amply compensated for the services which it renders (a) in sales promotion and (b) in establishing and enforcing a high price structure for its lenses at every stage of distribution, which structure, in the words of the district court (R. 29), is "artifically maintained by a framework of agreements in restraint of trade".

Only two companies in this country, so far as Soft-Lite's president was aware, now manufacture

[26] In 1936–1939 the gross margin of profit realized by Soft-Lite from the sale of its lenses to wholesalers was 104% of the amount which it paid to Bausch & Lomb for lenses, as shown by the following figures:

Year	Soft-Lite's total sales (R. 87-8)	Soft-Lite's payments to Bausch & Lomb (R. 89)	Soft-Lite's gross profit margin
1936	$766,000	$391,000	$375,000
1937	891,000	526,000	365,000
1938	807,000	309,000	498,000
1939	910,000	424,000	486,000
Total	3,374,000	1,650,000	1,724,000

pink-tinted glass: Soft-Lite and Pittsburgh Plate Glass, which is the source of supply of Soft-Lite's four leading competitors (R. 546–9). Soft-Lite has been advertising for a number of years that its lenses are a Bausch & Lomb product (R. 129). Its 1941 price list covering sales from wholesalers to prescription retailers states that its lenses are "made from sand to finished lens by Bausch & Lomb, America's most precise optical institution" (Ex. 168, R. 881).

Soft-Lite's sales substantially equal, in dollar value, the combined sales of pink-tinted lenses of its four leading competitors (Ex. 207, R. 955).[27]

SPECIFICATION OF ERRORS TO BE URGED IN NO. 62

The district court erred—

(1) In holding that Bausch & Lomb's agreement that it would not sell pink-tinted glass or lenses to any one other than Soft-Lite and that it would not itself market any pink-tinted lens did not unreasonably restrain interstate commerce, in violation of Section 1 of the Sherman Act.

(2) In failing to enjoin the exclusive provisions of the agreement between Bausch & Lomb and Soft-Lite and the making of any similar future exclusive agreement.

---

[27] While Soft-Lite's share of the market in pink-tinted lenses is 49.8% on a sales-price basis, it is only 45.1% on a unit or per-lens basis (computed from figures in Ex. 207). This further shows that under the Soft-Lite distribution system it is able to maintain prices higher than those of its direct competitors.

(3) In dismissing the complaint as against Bausch & Lomb and its defendant officers.

(4) In failing to enjoin Soft-Lite and its appellee officers, except for a six-months period, from systematically suggesting wholesale and retail resale prices for its lenses and from executing "fair trade" resale price maintenance contracts.

(5) In failing to enjoin Soft-Lite and its appellee officers from engaging in interstate commerce in pink-tinted lenses unless Soft-Lite files, within a specified time, an agreement to sell its lenses, without discrimination, to any person who offers to pay cash therefor.

SUMMARY OF ARGUMENT

I

The evidence fully supports the district court's finding that the Soft-Lite wholesalers combined with each other and with Soft-Lite to carry out the distribution system established by Soft-Lite, including maintenance of the resale prices designated by Soft-Lite and boycott of retailers not licensed by it. All elements of this distribution system were openly and explicitly announced to the trade and only wholesalers willing to cooperate in its enforcement were invited to become Soft-Lite wholesalers. Agreement by the wholesaler to carry out this system was implicit in his acceptance of the status of Soft-Lite wholesaler.

560996—43——4

Acceptance of an invitation to participate in a common plan of action which, if carried out, imposes restraints of the kind condemned by the Sherman Act is sufficient to establish an illegal conspiracy under the Act. *Interstate Circuit, Inc.* v. *United States,* 306 U. S. 208.

While a violation of the Sherman Act is not established when it merely appears that a seller of goods has announced the resale prices which he wishes his wholesale customers to observe and that he will refuse to deal further with those who fail to observe such prices (*United States* v. *Colgate & Co.,* 250 U. S. 300), an illegal conspiracy prohibited by the Act is established where from the entire course of dealing or from other circumstances there is found an agreement by the seller's wholesale customers to maintain the resale prices or other trade restrictions established by him (*United States* v. *Schrader's Son, Inc.,* 252 U. S. 85, 99–100). In the present case the evidence showed much more than mere passive acquiescence by the Soft-Lite wholesalers in its distribution system; it showed that they actively participated in formulating and enforcing all important elements of the system.

II

The conspiracy between Soft-Lite and its wholesalers was in full effect long prior to the making by Soft-Lite of "fair trade" resale price maintenance contracts with its wholesalers.

Since these contracts were among the means employed by the Soft-Lite defendants to effectuate their underlying illegal conspiracy, they were properly cancelled by the district court. Moreover, the contracts were the product of antecedent agreement among the wholesalers (made with one another through Soft-Lite) and they therefore constituted a horizontal agreement among competitors. The exemptions from the Sherman Act given by the Miller-Tydings Act do not embrace horizontal agreements among competitors.

III

Bausch & Lomb's agreement not to sell pink-tinted glass or lenses to Soft-Lite's competitors and not itself to market such lenses unreasonably restrains interstate trade and should have been enjoined. The agreement eliminates the potential competition of Bausch & Lomb, the leading manufacturer of optical glass. The agreement also denies to Soft-Lite's competitors the opportunity to obtain their needs from one of the two (or possibly three) available sources of supply. The resulting restraints cannot be brought within the common-law doctrine that a covenant in restraint of trade is not invalid if it is merely ancillary to the main purpose of a lawful contract and is no broader than reasonably necessary to achieve such main purpose. The agreement was not shown to be reasonably necessary to safeguard Soft-Lite's source of supply. No showing was

made that Bausch & Lomb's manufacturing facilities were or are inadequate to satisfy in full the requirements of both Soft-Lite and its competitors. Bausch & Lomb's agreement not to enter the market itself was likewise not shown to be reasonably necessary to protect Soft-Lite at the present time against the competition of the manufacturer of its product. Soft-Lite today has an established trade name and is the dominant concern in the marketing of pink-tinted lenses.

IV

The Government submits that the judgment below should be modified so as to enjoin Soft-Lite permanently, instead of only for six months, from systematically suggesting wholesale or consumer prices and from executing "fair trade" resale price maintenance contracts. These practices have been among the means used illegally to restrain trade. If Soft-Lite is left free to pursue these practices following a six-months' cooling-off period, there is a dangerous probability that ostensibly unilateral acts of Soft-Lite will, in actual effect, constitute tacit bilateral agreement. The Government should not be compelled to retry the issues determined in the present cause if the defendants' illegal conspiracy should thus be continued or revived. The Government is entitled to effective relief and, where reasonably necessary to assure such relief, acts which in themselves are lawful may be enjoined. A permanent injunction

does not mean that the defendants will be forever bound; it is always open to modification upon a showing that its provisions are no longer warranted.

For like reasons, the judgment should not leave Soft-Lite free to continue the prior misuse of its power to select its wholesale customers, but should require Soft-Lite to sell, without discrimination, to any wholesaler offering to deal with it on a cash basis.

V

The provisions of the judgment below authorizing the Government to inspect, subject to certain limitations, the Soft-Lite books and records relating to matters covered by the judgment do not infringe defendants' rights under the Fourth or the Fifth Amendment. The inspection authorized is confined to the business operations of Soft-Lite, that is, to corporate books and records. It is settled that a corporation holds its books and records subject to the obligation to permit inspection by the Federal Government and that no privilege against incrimination under the Fifth Amendment may be set up by the corporation or any officer thereof in opposition to appropriate governmental demand for inspection or production. *Wilson* v. *United States,* 221 U. S. 361. It is also settled that the compulsory production or inspection of corporate records is an "unreasonable" search and seizure prohibited by the Fourth Amendment only when it is so sweeping in scope

and so burdensome in effect as to be clearly unreasonable. The inspection permitted by the judgment below fully satisfies the requisite tests of reasonableness. See *Brown* v. *United States*, 276 U. S. 134.

ARGUMENT

I

THE EVIDENCE SUSTAINS THE DISTRICT COURT'S FINDING THAT THE SOFT-LITE WHOLESALERS AND SOFT-LITE COMBINED AND CONSPIRED TO MAINTAIN UNIFORM RESALE PRICES AND TO BOYCOTT RETAILERS NOT LICENSED BY SOFT-LITE

The facts previously recited unequivocably show that Soft-Lite and certain of its officers have been parties to a combination and conspiracy to fix resale prices on Soft-Lite lenses and to boycott wholesalers and retailers who do not agree to conform to Soft-Lite's distribution policies. It is likewise beyond question that such a combination violates the Sherman Act both because it involves illegal resale price maintenance and price fixing [28] and because it excludes from trade in Soft-Lite lenses all dealers who fail to agree to abide by Soft-Lite's sales and distribution policies.[29] As

[28] *Dr. Miles Medical Co.* v. *Park & Sons Co.*, 220 U. S. 373; *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150; *United States* v. *Univis Lens Co.*, 316 U. S. 241, 252–253.

[29] *Federal Trade Commission* v. *Beech-Nut Packing Co.*, 257 U. S. 441, 453–455; *Ethyl Gasoline Corp. v. United States*, 309 U. S. 436, 455–456; *Fashion Originators' Guild, Inc.* v. *Federal Trade Commission*, 312 U. S. 457, 465.

the district court said, "Obviously, trade is restrained by the distribution system of Soft-Lite" (R. 29).

The Soft-Lite defendants (appellants in No. 64) have conceded (Br. p. 7) that Soft-Lite's agreements with retailers restraining the latters' choice of customers and their resale prices were properly enjoined. The Soft-Lite defendants also make no contention that a conspiracy among the Soft-Lite wholesalers and Soft-Lite, such as found by the district court, would be permissible under the Sherman Act. In any event, since such conspiracy embraced sales at uniform prices and a boycott of all nonlicensed retailers, it falls directly within those conspiracies in restraint of trade which are *per se* a violation of the Sherman Act.[30] Accordingly, aside from the question of the scope of relief to be granted, the only issue before this Court respecting the Soft-Lite distribution system is whether the evidence sustains the district court's finding of conspiracy among the Soft-Lite wholesalers and Soft-Lite.

The Government submits that the evidence not only supports but requires the district court's finding. All elements of the Soft-Lite distribution system were openly and explicitly announced to the trade. Soft-Lite invited wholesalers and retailers to become dealers in Soft-Lite lenses if

---

[30] *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 221–222; *Fashion Originators' Guild, Inc.* v. *Federal Trade Commission*, *supra*, pp. 465–468.

and only if they were ready and willing to act in concert with each other and with Soft-Lite in carrying out its distribution system. To become such a dealer required, on the part of the retailer, express agreement, and, on the part of the wholesaler, implicit agreement, so to act.

The agreement of the retailers took the form of a series of uniform bilateral contracts with Soft-Lite, entered into with the knowledge that every other Soft-Lite retailer was bound by the same contract. While there was, apart from Soft-Lite's recent "fair trade" contracts, no written contract between Soft-Lite and its wholesalers, the parties acted upon the clear understanding that acceptance of the status of Soft-Lite wholesaler carried with it the obligation to act in concert with other wholesalers and with Soft-Lite in enforcing the Soft-Lite distribution system. Some of the considerations leading to this conclusion are summarized by the district court as follows (R. 30):

> The agreement is implicit in the operation of the system. The living reality of uniform prices from wholesalers to retailers, corresponding to the written instructions of the distributor, of wholesalers' refusal to sell to unlicensed retailers, of surveillance of wholesalers by means of protection certificates and over retailers by "shopping", compel the conclusion that between the wholesalers and the distributor

> there was agreement or at least acquiescence in a program of concerted action.

This Court has held that participation in a plan for common and united action by individual members of a trade group constitutes, when all parties are aware of the scheme for common action, a conspiracy among them. In *Interstate Circuit, Inc.* v. *United States,* 306 U. S. 208, 227, the Court said:

> It is elementary that an unlawful conspiracy may be and often is formed without simultaneous action or agreement on the part of the conspirators. [Citing cases.] Acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act.

The Court in that case, in holding that the facts showed that certain distributors of motion pictures were parties to an illegal conspiracy to restrain interstate commerce even in the absence of evidence that the distributors had agreed with each other to act in concert, said (p. 226):

> It was enough that, knowing that concerted action was contemplated and invited, the distributors gave their adherence to the scheme and participated in it.

The same conclusion was reached, upon similar facts, in *United States* v. *Masonite Corp.*, 316 U. S. 265, 274–275.

The Soft-Lite defendants rely primarily upon the holding in *United States* v. *Colgate & Co.*, 250 U. S. 300, that a seller of goods may, without violating the Sherman Act, freely exercise his own discretion in selecting his customers and may define in advance the conditions upon which he will continue to trade with them. But this decision has no application where the course of dealings between the seller and those to whom he sells is such as to establish an implied agreement by the latter to observe the resale price restrictions or other limitations on distribution prescribed by the seller. It is established that the Sherman Act prohibits any such agreement or combination if the restraints imposed are of a kind condemned by that Act. *United States* v. *Schrader's Son, Inc.*, 252 U. S. 85, 99–100; *Frey & Son, Inc.* v. *Cudahy Packing Co.*, 256 U. S. 208, 210; *Federal Trade Commission* v. *Beech-Nut Packing Co.*, 257 U. S. 441, 451–454.

In *United States* v. *Schrader's Son, Inc.*, this Court, in distinguishing the *Colgate* case, said (pp. 99–100):

> It seems unnecessary to dwell upon the obvious difference between the situation presented when a manufacturer merely indicates his wishes concerning prices and declines further dealings with all who fail

> to observe them, and one where he enters into agreements—whether express or implied from the course of dealing or other circumstances—with all customers throughout the different States which undertake to bind them to observe fixed resale prices. * * * In the second [situation], the parties are combined through agreements designed to take away dealers' control of their own affairs and thereby destroy competition and restrain the free and natural flow of trade amongst the States.

While *Frey & Son, Inc.* v. *Cudahy Packing Co., supra,* held that it was error to charge the jury that it might find a violation of the Sherman Act if it found that the defendant had frequently called to the attention of its wholesalers a sales plan which fixed minimum resale prices and that the great majority of the wholesalers had sold at the prices named, this holding provoked a vigorous dissent, has never since been referred to by this Court, and is difficult to reconcile with its recent decisions in the *Interstate Circuit* and *Masonite* cases. But in any event the evidence in the present case shows much more than mere observance of Soft-Lite's resale prices by the great majority of its wholesalers. It shows that they joined with Soft-Lite in selecting the retailers who were to be permitted to purchase Soft-Lite lenses and that they actively cooperated in promulgating and in policing and enforcing Soft-Lite's entire distribution system.

II

SOFT-LITE'S RESALE MAINTENANCE CONTRACTS WERE PROPERLY CANCELLED BY THE DISTRICT COURT BECAUSE THEY WERE NOT WITHIN THE EXEMPTIONS OF THE MILLER-TYDINGS ACT AND ALSO BECAUSE THEY WERE AN INTEGRATED PART OF AN ILLEGAL CONSPIRACY IN RESTRAINT OF TRADE

The Miller-Tydings Act of August 17, 1937, amended Section 1 of the Sherman Act by providing that nothing contained in that section "shall render illegal" contracts prescribing minimum prices for the resale of a commodity which bears the trade-mark, brand, or name of the producer or distributor thereof when contracts of that description are legal as applied to intrastate transactions under any statute in effect in any State in which such resale is to be made.[31]

Contracts within the scope of this amendment cannot, of course, be offered as evidence of a violation of Section 1 of the Sherman Act, and the United States in the present case presented no evidence concerning the contracts which Soft-Lite has recently made with most of its wholesalers fixing minimum resale prices on sales made by the wholesaler in any State in which there is a fair trade practice act.[32]

---

[31] Certain important limitations on the scope of this exemption are referred to later, *infra*, p. 36.

[32] The evidence presented by the defendants shows merely the form of contract which Soft-Lite submitted to its wholesalers on December 28, 1939, and that by the time of the trial in September 1941 it had made such contracts with all but

The Soft-Lite distribution system was in full flower long prior to the making of these fair trade practice act contracts. The making of these contracts effected no change in the situation except to formalize a part of the agreement between Soft-Lite and its wholesalers. The contracts, as the district court said, "came into existence as a patch upon an illegal system of distribution of which they have become an integral part" (R. 36).

One example will illustrate the validity of this characterization. Soft-Lite's "fair trade" contracts with its wholesalers covered only resales to "stock" retailers (R. 530–1),[32] but after the making of these contracts, just as before, the wholesalers were obligated to resell to both "stock" and "prescription" retailers at the prices fixed by Soft-Lite. Patently, therefore, maintenance of resale prices on sales to stock retailers was the product of the underlying conspiracy with the wholesalers rather than of the "fair trade" contracts.

---

22 of its wholesalers (R. 525–31, 629; Exs. R, S, S–1 (R. 989–97)). The Government filed its complaint in September 1940.

[33] On sales to prescription retailers the wholesaler does certain cutting or edging work. As to these sales, the wholesaler, by the work which he does, in effect creates a different "commodity" from that which he buys and the exemptions of the Miller-Tydings Act therefore do not apply. When products are manufactured in successive stages by different processors the Miller-Tydings Act does not authorize the first to control prices of his successors. *United States* v. *Univis Lens Co.*, 316 U. S. 241, 253–254.

The Miller-Tydings Act sanctions perpendicular control over resale prices by the producer or distributor of a commodity which carries his trade-mark, brand, or name; it does not sanction horizontal agreement between competing manufacturers, wholesalers, or other distributors.[31] Since in the present case the resale price maintenance contracts were the product of an antecedent joint agreement among the Soft-Lite wholesalers and Soft-Lite itself, this horizontal agreement among the Soft-Lite wholesalers was merely perpetuated when the wholesalers later entered into trade practice act contracts with Soft-Lite. Contracts which thus rest upon and perpetuate horizontal agreement among competitors of the same class are not within the exemptions given by the Miller-Tydings Act. *Connecticut Importing Co.* v. *Continental Distilling Corp.*, 129 F. (2d) 651, 654 (C. C. A. 2).

Moreover, the district court properly cancelled the "fair trade" contracts even if it be assumed that they come within the scope of the Miller-Tydings Act. The contracts were integrated with, and in effectuation of, a conspiracy between Soft-Lite and its wholesalers to control the distribu-

[31] A proviso excludes from the scope of the Act "any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other."

tion of Soft-Lite lenses by means of boycotts, price fixing, and other restraints. Under these circumstances cancellation of the contracts was an appropriate measure of relief against the defendants' unlawful conduct irrespective of whether the contracts might have been valid had they been disassociated from such conspiracy.

United States v. *Univis Lens Co.*, 316 U. S. 241, 254, held that where a licensing system had been used as a means of illegally restraining trade and where possibly valid provisions of the licenses were "interwoven with and identified with" their invalid features, "the entire licensing scheme" should be suppressed "even though some of its features, independently established, might have been used for lawful purposes." In *Ethyl Gasoline Corp.* v. *United States*, 309 U. S. 436, 461, this Court held that the Ethyl corporation's entire jobber licensing system had been rightly suppressed by the decree below even though this system "had been or might continue to be used for some lawful purposes."

III

BAUSCH & LOMB'S AGREEMENT NOT TO SELL PINK-TINTED GLASS OR LENSES TO ANY COMPETITOR OF SOFT-LITE AND NOT TO MARKET ITSELF A PINK-TINTED LENS UNREASONABLY RESTRAINS INTERSTATE COMMERCE AND SHOULD BE CANCELLED

We submit that Bausch & Lomb's agreement not to sell pink-tinted glass or lenses to any manu-

facturer or distributor other than Soft-Lite and not to market itself any pink-tinted lenses substantially and unreasonably restrains competition and is therefore illegal.

The agreement restrains trade in at least three respects. It precludes Bausch & Lomb from competing with Soft-Lite in the marketing of pink-tinted lenses and thus eliminates as a potential competitor a company described as America's "most precise" producer of optical goods. Further, it prevents direct competition between Bausch & Lomb and other manufacturers of pink-tinted glass. The latter competition is precluded since, as to Soft-Lite, its requirements are to be obtained from Bausch & Lomb exclusively, and, as to Soft-Lite's competitors, their requirements can be obtained only from concerns other than Bausch & Lomb. Finally, the agreement restrains competition by preventing Soft-Lite's competitors from obtaining pink-tinted glass or lenses from Bausch & Lomb. While there are one or two other domestic manufacturers of this glass (*supra*, pp. 21–22), there is nothing to show that their product was equally advantageous from the standpoint of price and quality. Where, as in the present case, the purpose and effect of an agreement is to exclude competitors from one of the very few available sources of supply, the burden of showing that this restraint does not seriously handicap competitors clearly rests upon

those who seek to justify the restraint as a reasonable one.

But even if the burden of proof were otherwise, the evidence creates a strong inference that denial of opportunity to purchase from Bausch & Lomb was a substantial competitive handicap. Soft-Lite has for years advertised that it sold a Bausch & Lomb-made product (*supra*, p. 22). This attests Soft-Lite's belief that it derived a competitive advantage from the fact which it advertised. The evidence also shows that Bausch & Lomb has been specializing in the supply of optical goods for 90 years and that its business is substantial (Ex. 203, R. 937, 940–1), whereas the Pittsburgh Plate Glass Company, the only other company definitely shown to be manufacturing pink-tinted glass for lenses, is not in any sense a specialist in optical goods.[35]

The district court recognized that the exclusive rights conferred on Soft-Lite by the Bausch & Lomb agreement operated to restrain trade but it concluded that the restraint was reasonable and therefore not forbidden by the Sherman Act (R. 33–36). The court was of the opinion that the

[35] Moody's *1943 Industrial Manual*, in describing that company's business, does not even mention manufacture of optical goods. The Manual (pp. 1999–2000) states that the company is one of the leading producers of plate and window glass, of paint, varnish, lacquer and brushes, and of soda ash and caustic soda; that it produces a variety of chemicals; and that "Relatively minor divisions of the business comprise the manufacture of Portland cement, dry colors, insecticides, fungicides and seed grain disinfectants."

restraint came within the doctrine of "ancillary" or "partial" restraint of trade set forth in *United States* v. *Addyston Pipe & Steel Co.*, 85 Fed. 271 (C. C. A. 6), affirmed, 175 U. S. 211. In that case the court, speaking through Circuit Judge Taft, said (p. 282) that the common law did not condemn a covenant which restrained trade if the restraint imposed was "merely ancillary to the main purpose of a lawful contract" and was no broader than reasonably necessary to achieve such main purpose.[36] In the case at bar the court below was of the opinion that the main purpose of the Bausch & Lomb agreement was "to provide a source of supply for Soft-Lite" and that the "restraining covenant is for the protection of the purchaser who is spending large sums to develop his good will and enlarge the public patron-

---

[36] This general statement was clarified by the court's prior enumeration (p. 281) of the five instances in which covenants in partial restraint of trade were generally upheld as valid at common law, namely, when they were agreements—

(1) by the seller of property or business not to compete with the buyer in such a way as to derogate from the value of the property or business sold; (2) by a retiring partner not to compete with the firm; (3) by a partner pending the partnership not to do anything to interfere, by competition or otherwise, with the business of the firm; (4) by the buyer of property not to use the same in competition with the business retained by the seller; and (5) by an assistant, servant, or agent not to compete with his master or employer after the expiration of his time of service.

age of a relatively new article of commerce" (R. 35).

The Government submits that, assuming that the main purpose of the agreement was that found by the court below, the agreement not to sell to any competitor of Soft-Lite is not reasonably necessary to safeguard Soft-Lite's source of supply. There is no shadow of evidence that Bausch & Lomb's manufacturing facilities are now or ever have been inadequate to supply in full Soft-Lite's requirements and those of its competitors. The record is likewise barren of evidence that the exclusive right to purchase pink-tinted lenses which Bausch & Lomb conferred upon Soft-Lite serves any end other than excluding competitors from this source of supply. Obviously exclusiveness is not an ordinary incident of a supply contract and pink-tinted glass for lenses is no exception to the general rule. Soft-Lite's principal competitors who, of course, also compete with each other, purchase their glass from a single manufacturer (*supra*, p. 22).

On the question of reasonableness, there is an additional factor of importance, growing out of Bausch & Lomb's control of its wholesale distribution affiliates. The Bausch & Lomb agreement not only deprives Soft-Lite's competitors of freedom of choice in selecting their sources of supply but also puts them at a disadvantage with Soft-Lite in marketing their product. Bausch & Lomb

controls six important optical wholesalers and, under the present agreement with Soft-Lite, Bausch & Lomb's interest, so far as pink-tinted lenses are concerned, consists in promoting the sale of Soft-Lite lenses. In consequence, Bausch & Lomb's wholesale affiliates either do not handle at all competitive pink-tinted lenses or direct their sales effort primarily to the sale of Soft-Lite lenses (Ex. 202, R. 934–5). Thus the alliance in interest between manufacturer and purchaser growing out of the exclusive right to purchase conferred upon Soft-Lite is extended to and is effective in the field of distribution. It is, of course, settled that where the alleged reasonableness of the restraint is properly in issue in a Sherman Act proceeding, the courts give consideration to all relevant surrounding circumstances. To give consideration to the effect of Bausch & Lomb's control over its affiliates involves no piercing of the corporate veil.

It should also be noted that Section 3 of the Clayton Act, 38 Stat. 730, 15 U. S. C. sec. 14, makes unlawful an agreement by a purchaser or lessee of goods not to deal in the goods of a competitor of the seller or lessor where the effect "may be" substantially to lessen competition in any line of commerce. The instant case involves the converse situation, an agreement by the seller of goods not to sell to a competitor of the purchaser. The restraint is of the same type and character in either case and the fact that Congress

in the Clayton Act dealt with this type of restraint only when imposed for the benefit of sellers and lessors is explained by the widespread use of tying clauses by sellers and lessors—especially in the case of patented goods—whereas agreements not to sell to competitors of the purchaser of goods are comparatively rare. The legislation was therefore directed at the particular evil brought to the attention of Congress.[37]

The Clayton Act is supplementary to the Sherman Act and while the former statute, within its sphere, establishes its own rule (*United Shoe Machinery Co.* v. *United States*, 258 U. S. 451, 460), we submit that in passing upon the question whether the alleged reasonableness of a particular type of restraint removes it from the prohibitions of the Sherman Act, the fact that a restraint of the same type and character is condemned by the Clayton Act is a pertinent consideration.

Possibly Bausch & Lomb will urge that an agreement to manufacture a certain kind of goods exclusively for one customer is analogous to an exclusive agency agreement. But it is in the very nature of a true agency agreement that the agent act under the control and direction of his prin-

---

[37] The legislative history of the Clayton Act shows that Congress was aware of and gave consideration to court decisions dealing with tying clauses imposed by lessors of patented goods and Congress expressly provided that Section 3 should apply to the sale and lease of goods "whether patented or unpatented." *International Business Machines Corp.* v. *United States*, 298 U. S. 131, 137–138.

cipal and in the case of many agency agreements the legitimate objectives of the agency relationship can be achieved only if the agent is obligated to devote his full time and attention to the business of his principal. This appears to have been the basis of decision in *Federal Trade Commission* v. *Curtis Publishing Co.*, 260 U. S. 568, which held that it is not an unfair method of competition under the Federal Trade Commission Act for a magazine publisher to enter into a series of contracts with wholesale dealers in magazines making the latter its exclusive agents.[38]

We have previously discussed the Bausch & Lomb agreement from the standpoint of the reasonableness of the restraints imposed by the agreement not to sell to Soft-Lite's competitors. The Government also submits that Bausch & Lomb's agreement not to market itself any pink-tinted lens is, at least today, not reasonably necessary to protect Soft-Lite's interests as a purchaser of lenses from Bausch & Lomb and that this undertaking not to compete is therefore illegal. In this case the Court is not required to pass upon the question of what would have been the validity, at the time the original agreement was made in 1924, of a covenant of limited dura-

[38] The Court in that case pointed out (p. 581) that the record clearly disclosed that the Curtis Company had originated the plan of selling their periodicals through schoolboys, entailing "the necessity for exclusive agents to train and superintend these boys and to devote their time and attention to promoting sales."

tion against Bausch & Lomb competition."[39] The question presented is the validity today of the covenant not to compete, taking into consideration that it is without limitation in time and that Soft-Lite is now established as the dominant concern in its particular field.

The fact that the covenant is beneficial to Soft-Lite obviously does not establish that it is necessary to secure to it the right to purchase lenses from Bausch & Lomb. If the agreement is struck down and if Bausch & Lomb chooses to market a pink-tinted lens, Soft-Lite can determine whether its interests will be better served by continuing to purchase from Bausch & Lomb or by turning to another source of supply. If the agreement is not struck down, it will, unless abandoned by the parties, run in perpetuity although any color of sanction which it may have had originally has long since faded away. Restraints against competition which were unlimited in time were invalid at common law."[40]

[39] Possibly such a covenant might be justified during the initial years of a business venture to expand the market of a commodity which, at least from the sales-promotion standpoint, might be deemed a new product.

[40] See Handler, *Restraint of Trade*, 13 Encyclopedia of the Social Sciences 340:

> Reasonableness was tested by the effects of the restraint upon the parties to the covenant and the public. If broader in space and time than the situation demanded * * *, the contract was invalid. * * * Partial restraints, that is, agreements limited in area and time of operation, were lawful; general restraints, or agreements unlimited in time and in space, were forbidden.

If, as we have contended, Bausch & Lomb's agreement not to sell pink-tinted lenses to concerns other than Soft-Lite and not itself to market such a lens is illegal, an injunction merely forbidding the carrying out of this agreement or the making of any future like agreement would not afford adequate relief. Such an injunction would not prevent Bausch & Lomb from announcing that it had, as its own independent act, adopted the policy of selling pink-tinted glass and lenses only to Soft-Lite. The courts should not permit the fruits of illegal combination to be so easily retained. Under the circumstances of this case, something more drastic than a mere injunction against agreement is called for if continuation of a line of conduct, resting on 19 years of illegal combination and agreement, is to be prevented.

The Government submits that the judgment entered should enjoin Bausch & Lomb from engaging in interstate commerce in pink-tinted glass or lenses unless, within a specified period after the effective date of judgment, it files with the district court a written instrument providing that, so long as it continues to sell such glass or lenses, it will sell the same, without discrimination, to any person offering to pay cash therefor.

The legal considerations raised by this form of relief are discussed later (*infra*, pp. 52–53) in connection with our contention that certain additional injunctive provisions should be incorpo-

rated in the judgment entered against Soft-Lite and its officers.

IV

THE PROHIBITIONS OF THE JUDGMENT OF THE DISTRICT COURT DO NOT ADEQUATELY GUARD AGAINST CONTINUATION OR REVIVAL OF THE ILLEGAL SOFT-LITE DISTRIBUTION SYSTEM AND SHOULD BE BROADENED

The judgment entered by the district court requires Soft-Lite to cancel its retailer licenses and its "fair trade" resale price maintenance contracts (R. 62). It enjoins Soft-Lite (a) from making any agreement with a retailer which fixes the prices or otherwise relates to the retailer's sale of goods not purchased from Soft-Lite; (b) from carrying out any present agreement or making any new agreement with a wholesaler which provides that the latter sell only to designated persons or which fixes the prices at which the wholesaler shall sell to prescription retailers; and (c) from using any device permitting the tracing of lenses after the first sale (R. 62–3). The judgment also enjoins Soft-Lite, for a six-months' period, from "systematically suggesting" to any person wholesale, prescription, or consumer prices on Soft-Lite lenses and from executing "fair trade" resale price maintenance contracts (R. 63). The Government believes that these injunctive provisions are in certain respects insufficient to prevent continuance of the effects and purposes

of the illegal Soft-Lite distribution system and evasion of the prohibitions of the judgment.

Where a violation of the Sherman Act has been found the court is "bound to frame its decree so as to suppress the unlawful practices and to take such reasonable measures as would preclude their revival." *Ethyl Gasoline Corp.* v. *United States*, 309 U. S. 436, 461. In *Local 167* v. *United States*, 291 U. S. 293, 299, the principles to be applied are stated as follows:

> The United States is entitled to effective relief. To that end the decree should enjoin acts of the sort that are shown by the evidence to have been done or threatened in furtherance of the conspiracy. It should be broad enough to prevent evasion. In framing its provisions doubts should be resolved in favor of the Government and against the conspirators.

(1) The Government submits that the injunction against "systematically suggesting" wholesale, prescription, or consumer prices on Soft-Lite lenses and the injunction against execution of "fair trade" resale price maintenance contracts should be without limitation in time. Soft-Lite wholesalers have been, for many years, selling at the prices shown in Soft-Lite's published price lists. Trade practices built upon long-continued common action and agreement are likely to be deeply rooted. The Soft-Lite wholesalers know that its policy has been to have its lenses sold to

retailers at uniform prices and to refuse to sell to wholesalers who do not maintain its policy. If publication of price lists showing wholesaler-to-retailer prices is permitted after only a six-months' interlude, the published prices, although termed "suggested" prices, would probably have the force of command, and in any case would provide the means for maintaining resale prices by tacit agreement and thus, in effect, continuing or reviving the combination and conspiracy held to be illegal.

As to the time limitation on the injunction against "fair trade" resale price maintenance contracts, if Soft-Lite is left free to enter into such contracts within six months from the entry of the judgment it can again utilize these contracts as a means of continuing or reviving its previous combination with wholesalers to fix uniform prices for wholesaler-to-retailer sales.

The Government recognizes that the mere making of such contracts, just as suggesting to customers the prices to be charged on resale, is not, standing alone, a violation of the Sherman Act. But acts lawful in themselves may be enjoined when they have been used as a means for effectuating an illegal combination or conspiracy. In *Ethyl Gasoline Corp.* v. *United States,* 309 U. S. 436, this Court held that since the Ethyl Corporation's jobber licensing system had been used as a means of illegally restraining trade, the dis-

trict court had properly enjoined the licensing of jobbers *in toto* notwithstanding the fact that such licensing might have been used and might continue to be used for some lawful purposes. See also *United States* v. *Univis Lens Co.*, 316 U. S. 241, 254.[41]

The mere fact that the injunction would be in terms permanent does not mean that the defendants would be forever bound. Modification could be obtained at any time upon a proper showing. Not only did the court below reserve power to modify its injunction (R. 64) but, even in the absence of such a reservation, "A continuing decree of injunction directed to events to come is subject always to adaptation as events may shape the need." *United States* v. *Swift & Co.*, 286 U. S. 106, 114. In the *Milk Wagon Drivers Union* case, note 41, the Court said (p. 298) that the injunction which it sustained was permanent "only for the temporary period for which it may last," since familiar equity procedure afforded opportunity for modification or vacation when and if continuance should no longer be warranted.

---

[41] *Milk Wagon Drivers Union of Chicago* v. *Meadowmoor Dairies, Inc.*, 312 U. S. 287, held that conduct not only lawful in itself but also within the protection of the Bill of Rights could be enjoined when it had been found to be "enmeshed with" contemporaneously illegal conduct and when the evidence justified the conclusion that the lawful conduct, if allowed to continue, would again generate illegal acts of violence.

(2) The Government also submits that the judgment below fails adequately to prevent continuation of the Soft-Lite policy, effected through the cooperation of its wholesalers, of permitting sale of its lenses only by selected retailers. While the judgment prohibits agreement with wholesalers to do this, the judgment places no limitation upon Soft-Lite's freedom to select the wholesalers to whom it will sell. The present Soft-Lite wholesalers, schooled in the Soft-Lite policy that "unethical" retailers (i. e., those engaging in any price competition or certain other like practices) shall not receive Soft-Lite lenses, and aware that wholesalers who sell to such retailers are cut off the Soft-Lite list, will in all probability so carry on their business as to continue, for all practical purposes, the existing boycott of "unethical" retailers.

There is reason to believe that, with the cooperation of Soft-Lite's present wholesalers and without ostensible agreement, a large measure of the prior illegal distribution system can be successfully continued under the judgment entered below. The Government submits that, in order effectively to prevent such threatened evasion and nullification of the judgment, Soft-Lite should be enjoined from engaging in interstate commerce unless, within a specified period after entry of judgment, it files with the district court a written instrument providing that it will sell its product, without discrimination, to any person

offering to pay cash therefor. Such an injunction would not interfere with Soft-Lite's right to sell at its own price or with other lawful terms of sale provided they apply uniformly to all purchasers in similar circumstances.

The freedom of customer selection permissible under the holding in *United States* v. *Colgate & Co.*, 250 U. S. 300, is conditioned upon the absence of agreement with others as to the manner in which this power shall be exercised. Where, as in this case, the evidence shows such agreement and misuse of the power of customer selection and the evidence points to probable continued abuse of this power, the judgment should be so framed as to prevent renewal of the conditions and situation found to be illegal.

A precedent for relief more comprehensive than that suggested is found in *United States* v. *Hartford Empire Co.*, 46 F. Supp. 541 (N. D. Ohio), now pending on appeal before this Court (Nos. 7–16). The defendants in that case, who had conspired to obtain patents and to take other action in order to restrain and monopolize trade in glass containers, were enjoined from engaging in interstate commerce unless they agreed to grant licenses under their patents, royalty free, to anyone and unless they agreed to sell glass-making machinery, without discrimination, to any applicant who offered to pay cash or had a proper credit rating. This Court, moreover, has de-

clared that to forbid a defendant who has violated the Sherman Act from engaging in interstate commerce until he has taken the necessary steps to remedy the situation brought about by his illegal conduct may be an appropriate form of relief. *United States* v. *American Tobacco Co.*, 221 U. S. 106, 186.

In Sherman Act cases in which this Court has approved the conclusions of the district court as to the nature and character of the defendant's violation of the statute, this Court has not hesitated to review and to modify the remedy to be granted. *Standard Oil Co.* v. *United States*, 221 U. S. 1, 78–82; *United States* v. *American Tobacco Co.*, 221 U. S. 106, 188. See also *Continental Insurance Co.* v. *United States*, 259 U. S. 156.

V

THE PROVISIONS OF THE JUDGMENT PERMITTING AUTHORIZED REPRESENTATIVES OF THE DEPARTMENT OF JUSTICE TO EXAMINE, UNDER CERTAIN LIMITATIONS, SOFT-LITE'S BOOKS AND RECORDS AND THOSE OF CERTAIN OFFICERS THEREOF DO NOT VIOLATE DEFENDANTS' CONSTITUTIONAL RIGHTS

Paragraph nine of the district court's judgment provides that authorized representatives of the Department of Justice shall be given access to the books, accounts, correspondence, and other documents in the defendants' possession (R. 63–4). This right of access is granted only "for

the purpose of securing compliance with" the judgment; it may be made only after written request by the Attorney General or an Assistant Attorney General and after reasonable notice; it is limited to documents relating to the matters contained in the judgment (*ibid.*). Furthermore, such access is "subject to any legally recognized privilege" and improper disclosure of the information obtained is prohibited. The Soft-Lite defendants, relying upon *Boyd* v. *United States*, 116 U. S. 616, contend that the right of inspection thus granted permits unreasonable searches and seizures and requires the defendants to bear witness against themselves, in violation of rights guaranteed by the Fourth and Fifth Amendments.

The *Boyd* case involved the validity of proceedings under a statute which authorized the United States to demand production of documents under the control of a party to the litigation and provided that, upon failure to produce or to furnish satisfactory explanation of the failure, the allegations of the motion to produce should be "taken as confessed." This Court held that production of an individual's "personal" papers, pursuant to this procedure, in order to connect him with a crime, constituted self-incrimination and an unreasonable search and seizure prohibited by the Fifth and Fourth Amendments. It is settled, however, that the holding in the *Boyd* case has no application to the compulsory

production of *corporate* books or records, whether the claim that the documents demanded are incriminating is set up on behalf of the corporation itself or by an officer having possession or custody. This Court has consistently adhered to its holdings in *Hale* v. *Henkel,* 201 U. S. 43, and *Wilson* v. *United States,* 221 U. S. 361, that corporations hold their books and records subject to a reserved visitorial power by State and National Governments and therefore may not resist production on the ground of self-incrimination and that an officer of a corporation is subject to the same obligation to produce and cannot set up his personal privilege against any demand of government which the corporation itself is bound to recognize. Obviously the right of inspection conferred by the judgment in the instant case is confined to corporate books and records; the judgment as to which this right is an adjunct is confined to the business operations of Soft-Lite.

The Soft-Lite defendants have not specifically urged that the right of inspection given the Government by the judgment below is so broad as to condemn it as unreasonable. The Fourth Amendment protects corporations against "unreasonable" searches and seizures and a demand for production of documents may be unreasonable if it is sweeping in scope, not limited to matters pertinent to the inquiry, and unduly onerous. *Hale* v. *Henkel, supra,* at pp. 76–77. The scope of inspection authorized by the judgment in the

instant case clearly is sufficiently defined and limited to satisfy the requirements of the Fourth Amendment (*supra* pp. 53–54). *Brown* v. *United States*, 276 U. S. 134, upheld the validity under the Fourth Amendment of a subpoena calling for the production of all correspondence, during a period of three and a half years, between a trade association and its members "relating to" eighteen enumerated topics which were defined in the most general terms.[42] See also *Consolidated Rendering Co.* v. *Vermont*, 207 U. S. 541, 553–554.

We also submit that the Soft-Lite defendants are premature in raising their constitutional objection. If the Government representatives should so apply the authority conferred by the judgment as to infringe defendants' constitutional rights, this would transgress the express limitation that the right of inspection granted was subject to any "legally recognized privilege." Nor would the defendants be without adequate remedy to prevent any such attempted excess of authority. The judgment (par. 11) authorizes the defendants to apply to the court at any time for such further orders or directions as may be necessary or appropriate for the "construction" of the judgment (R. 64).

---

[42] Among these topics were "Costs of manufacture," "Maintaining prices," "Advancing prices," "Reducing prices," "Discounts, terms, and conditions of sale, etc."

The demand covered the correspondence with the association's 192 members (Record in this Court in the *Brown* case, p. 6).

CONCLUSION

It is respectfully submitted that the judgment of dismissal as to Bausch & Lomb and its defendant officers should be reversed and that the judgment as to Soft-Lite and its appellee officers should be affirmed, with directions to modify the judgment to cure the deficiencies covered by the fourth and fifth of the Government's specifications of error (*supra*, p. 23).

CHARLES FAHY,
Solicitor General.
WENDELL BERGE,
Assistant Attorney General.
CHARLES H. WESTON,
Special Assistant to the Attorney General.
MELVILLE C. WILLIAMS,
Special Attorney.

NOVEMBER 1943.

U. S. GOVERNMENT PRINTING OFFICE: 1943